

Missouri Law Review

Volume 65
Issue 2 *Spring 2000*

Article 8

Spring 2000

Rule of Law(yers), The

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Recommended Citation

Robert F. Cochran Jr., *Rule of Law(yers), The*, 65 Mo. L. REV. (2000)
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Review Essay

The Rule of Law(yers)

THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS. By William H. Simon.* Boston: Harvard University Press, 1998. Pp. viii, 253. \$35.00.

Robert F. Cochran, Jr.**

I. INTRODUCTION

In recent years, several lawyers and law professors have written books about the decline of ethical behavior in the legal profession.¹ They have found that lawyers are more adversarial, less civil, less honest, less concerned with justice, and less happy than in the past.² Associates are less loyal to firms, and firms are less loyal to associates.³ Many lawyers lament what the profession has become. They wonder whether they do a good thing. "Can I be a lawyer and a good person?" "Do lawyers add to the misery of the world?"

One of the striking things about several of the recent lawyer books is that their authors are among the most distinguished law professors in the country.⁴ At one time, legal academics considered the legal profession a rather mundane subject. But the decline of the profession has captured the attention of many within the legal academy. Law professors want their students to find a meaningful life in the law; they want law practice to promote justice. They are also concerned with whether law professors do a good thing. "Can I be a law professor and a good person?" "Do law professors add *exponentially* to the misery of the world?"

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1. See, e.g., MARY ANN GLENDON, *A NATION UNDER LAWYERS* (1994); ANTHONY T. KRONMAN, *THE LOST LAWYER* (1993); SOL M. LINOWITZ, *THE BETRAYED PROFESSION* (1994); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); MIKE PAPANTONIO, *IN SEARCH OF ATTICUS FINCH* (1996); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994).

2. See, e.g., GLENDON, *supra* note 1, at 31-39, 51-59, 69-91; KRONMAN, *supra* note 1, at 1-4, 294-300.

3. See, e.g., KRONMAN, *supra* note 1, at 277-88; GLENDON, *supra* note 1, at 21-28.

4. All of the authors cited *supra* note 1 are law professors except Mike Papantonio and Sol Linowitz. Mary Ann Glendon is the Learned Hand Professor at Harvard; Anthony Kronman is the Dean and Edward J. Phelps Professor at Yale; David Luban is the Frederick J. Haas Professor of Law and Ethics at Georgetown; and Thomas Shaffer is the Robert E. & Marion D. Short Professor Emeritus at Notre Dame.

William H. Simon's *The Practice of Justice: A Theory of Lawyers' Ethics* is the most recent law professor critique of the profession. Simon argues that the problem with lawyers is at the heart of what the profession calls on lawyers to do.⁵ Under what Simon calls "the Dominant View" of lawyering, lawyers do whatever is "arguably legal" for clients.⁶ The representation is, to use a term common in client counseling circles, "client-centered."⁷ The lawyer, in the words of Murray Schwartz, "[w]hen acting as an advocate for a client . . . is neither legally, professionally, nor morally accountable for the means used or the ends achieved."⁸ As Simon argues, such advocacy is likely to undercut the search for justice.⁹ It may advance the autonomy of clients, but it comes at the expense of the autonomy of other people. It is likely to advance the autonomy of those who can afford lawyers at the expense of those who can not.

Many of the recent books on the legal profession look back nostalgically to the 1950s as a time when the practice of law was more civil and lawyers were more concerned with justice.¹⁰ Simon harkens back to a different 50s, the

5. Simon suggests that the moral anxiety of lawyers has its roots in:

[A] structural tension in the lawyer's role that has always been present but has become more acute during the past century. The core of the explanation is this: the dominant conception of the lawyer's professional responsibilities weakens the connection between the practical tasks of lawyering and the values of justice that lawyers believe provide the moral foundations of their role.

See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 2 (1998).

6. Simon finds the fault in the legal rules and legal ethics commentary that advocate "the Dominant View": "the lawyer must—or at least may—pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous legal claim." See SIMON, *supra* note 5, at 7.

7. I adopt the term "client-centered" from the client-centered legal counselors who argue that the lawyer's primary concern should be increasing client autonomy and advancing client interests. See *infra* notes 102-11 and accompanying text.

8. Murray Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978).

9. Simon identifies the weaknesses in the arguments for the Dominant View. Aggressive lawyer advocacy may increase client autonomy, but it tends to do so at the expense of the autonomy of others. See SIMON, *supra* note 5, at 26-52. Clients should not have, in Simon's terms, "A Right to Injustice." See SIMON, *supra* note 5, at 26. The "Dominant View" holds that aggressive advocacy will aid courts in the search for truth and justice, but, as those who have experience with the court system know, lawyer advocacy often inhibits that search rather than aiding it. There is little evidence supporting the view that aggressive lawyer advocacy will provide "Justice in the Long Run." See SIMON, *supra* note 5, at 53-76.

10. See, e.g., GLENDON, *supra* note 1, at 35-39; KRONMAN, *supra* note 1, at 50-51, 277, 283, 294-95. My law professor, Thomas Bergin, who practiced law on Wall Street in the 1950s, says that in those days, "lawyers were the moral conscience of Wall Street."

1850s.¹¹ He praises the ethical precepts of the authors of the earliest American lawyer codes, David Hoffman¹² and George Sharswood.¹³ They argued that lawyers should assume “public responsibility and [exercise] complex normative judgment.”¹⁴ Sharswood argued that “[c]ounsel have an undoubted right, and are duty bound, to refuse to be concerned for a plaintiff in the pursuit of a demand, which offends his sense of what is just and right.”¹⁵ Simon renews Hoffman’s and Sharswood’s call for lawyers to seek justice. He argues that “[l]awyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice.”¹⁶

In a world in which many law professors view law merely as an exercise of power or a means to efficiency, it is refreshing to hear Simon’s call for lawyers to seek justice. But a lot has happened in the century and a half since Hoffman and Sharswood challenged a young country’s lawyers. Hoffman’s and Sharswood’s voices were pre-modern. They were confident that they knew what justice was, and they were willing to see that clients pursued it. But today’s “Dominant View” of lawyering is a product of the modern and post-modern eras. Under liberal notions of lawyering, the lawyer’s only concern is to advance the autonomy of the client; the assumption is that the choices of autonomous individuals will advance the common good.¹⁷ Post-modernity takes a more

11. Simon cites the activities of David Dudley Field—going from judge to judge to obtain injunctions on behalf of Jim Fisk and Jay Gould—in 1870 as an example of the Dominant View of lawyering. See SIMON, *supra* note 5, at 160-62.

Legal historian Michael Schudson also notes a shift in legal ethics in the middle of the nineteenth century and also uses David Dudley Field as a primary example of the shift. In the first half of the nineteenth century, Field was a law reformer, drafting the Field Code, which was adopted by New York in 1848. In 1870, he was involved in the scandals arising from his representation of “the notorious James Jay, Jay Gould, and their Erie Railroad.” Schudson argues that “by the 1870s leading American lawyers were coming to espouse a responsibility to their clients as their primary and even exclusive moral obligation as lawyers.” Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191 (1977), reprinted in THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS 183-85, 315-29 (1985).

12. See SIMON, *supra* note 5, at 33, 63-64.

13. See SIMON, *supra* note 5, at 63-64.

14. SIMON, *supra* note 5, at 63.

15. SIMON, *supra* note 5, at 63 (quoting GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 39 (2d ed. 1860)).

16. SIMON, *supra* note 5, at 138.

17. For example, client-centered legal counselors teach that the primary concern of the lawyer should be to advance the autonomy of the client. See *infra* notes 103-09 and accompanying text. For some client-centered counselors, this theory is based on a belief that people will be good if given autonomy. Client-centered counselors Robert Bastress and Joseph Harbaugh base their client-centered theory on the work of psychologist Carl Rogers. ROBERT M. BASTRESS & JOSEPH D. HARBAUGH,

skeptical view of human nature, but it has tended to reinforce the "Dominant View" of lawyering as well. In the post-modern view, no one has a greater claim to understanding the good than anyone else. The lawyer should not influence the client because the lawyer's perception of the good is likely to be no better than that of the client.¹⁸ In response to Simon's call for lawyers to seek justice, our post-modern era asks the question of philosopher Alasdair MacIntyre: "Whose Justice?"¹⁹

Simon's surprising answer is that lawyers should look to the law for their understanding of justice. Justice is to be found in our "legal values."

'Justice' here connotes the basic values of the legal system and subsumes many layers of more concrete norms. Decisions about justice are not assertions of personal preferences, nor are they applications of ordinary morality. They are legal judgments grounded in the methods and sources of authority of the professional culture. I use 'justice' interchangeably with 'legal merit.'²⁰

INTERVIEWING, COUNSELING, AND NEGOTIATING 57 (1990). Bastress and Harbaugh state: "Rogerians believe humans to be fundamentally good. The helper [lawyer], then, need only nurture that natural goodness. When individuals feel understood, feel good about themselves and find acceptance, they will respond rationally and positively, in terms of their own growth and their relations with others." *Id.* at 27.

This belief that autonomy will yield moral behavior has its roots in the teachings of Kant. See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS, AND WHAT IS ENLIGHTENMENT? 67-68 (Lewis White Beck trans., 1959). Kant believed that autonomy not only would lead to morality but that it was also a necessary precondition to morality. *Id.* at 59.

18. Some client-centered counselors take a post-modern route to their belief that the lawyer should focus on client autonomy. The Binder, Bergman, and Price text advocates client control based on a post-modern lack of confidence in the lawyer's ability to discern truth. It discourages the lawyer from bringing "your personal values" into the discussion, and states that "a client whose values differ from yours is not 'wrong.'" DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS 283-84 (1991). The quote marks around "wrong" suggest that wrongness is not a meaningful concept. If lawyers cannot be confident of their moral values, and clients cannot be wrong, lawyers should defer to client values.

19. ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988).

20. SIMON, *supra* note 5, at 138. Simon calls on lawyers to apply contextual judgment, much like a common law judge. The lawyer would apply contextual standards to the issues that arise. Simon further states:

Contextual standards are general norms that depend on, and are typically derived from, the circumstances of particular applications. Since new and unique cases constantly arise, the answers involve creativity; yet when they are plausible, they seem to have been implicit in the pre-existing norms. To the extent that the lawyer shares the relevant public norms, she expresses her own values as she vindicates the public ones.

I share Simon's belief that lawyers should pursue justice,²¹ but in this essay, I discuss two problems with Simon's model. The first, which I will discuss in Part II, is Simon's choice of "legal values" as the source of justice. Simon presents two very different versions of how a lawyer might discern justice from legal values. At times, a "legalistic" Simon suggests that lawyers discern justice through the ordinary lawyer's means of legal analysis.²² This Simon suggests that the lawyer should be controlled by the values actually found in the law. My concern is that the law can be a poor source of values. At other times, a "moralistic" Simon wants lawyers to ignore the ordinary means of discerning law²³ and to identify justice based on "legal ideals." But, of course, there are a lot of "legal ideals." The "legal ideals" that a lawyer discerns are likely to look a lot like the lawyer's ideals. This version of Simon's model would be likely to cloak the lawyer's moral judgment in legal garb, giving it the authority of law. I will argue that the "moralistic" version of Simon's model is likely to be deceptive and to muddle moral issues. My suggestion is that in conversations with clients, lawyers explicitly address moral issues as moral issues and that lawyers and clients together seek to determine what would promote justice.

A second problem with either incarnation of Simon's model is that it will exclude the client from participating in the resolution of many important issues that arise in the law office. Simon's model, like that of Hoffman and Sharswood, is authoritarian. Whereas the "Dominant View" or client-centered model of lawyering has no place for the values of the lawyer, Simon's model has no place for the values of the client.²⁴ In Part III, I will explore the authoritarian and client-centered models of lawyering. I will also consider the possibility of a collaborative model of lawyer-client relations, in which the client and lawyer together wrestle with the demands of justice.

SIMON, *supra* note 5, at 126.

21. SHAFFER & COCHRAN, *supra* note 1, at 62-69; *see infra* text accompanying notes 104-05. I also share Simon's view that a lawyer's judgment should be contextual. *See, e.g.,* Robert F. Cochran, Jr., *Lawyers and Virtues*, 71 NOTRE DAME L. REV. 707, 707-30 (1996).

22. "The range of sources and authorities and the modes of analysis and argument that lawyers habitually employ in their everyday work are available and appropriate for the central issues of legal ethics." SIMON, *supra* note 5, at 18.

23. Simon is critical of what he calls the positivist premise that "legal norms are identified, procedurally, by their lineage to some organ of the state, and substantively, by the fact that they are commands or prohibitions backed by sanctions." SIMON, *supra* note 5, at 37.

24. In theory, if the morals to be applied by Simon's lawyer are coming from the law, there is no place for the morals of the lawyer. Nevertheless, I suspect that the legal ideals that Simon's lawyer discerns are likely to look very much like the lawyer's moral ideals. Calling them "legal ideals" only cloaks them in mystery and removes them from the ability of clients to evaluate them.

II. LAW AND MORALITY IN THE LAW OFFICE

A. *The Legalistic Simon: Justice as Law*

As noted previously, Simon at times argues that lawyers should discern justice through the ordinary tools of legal analysis. He says, "The range of sources and authorities and the modes of analysis and argument that lawyers habitually employ in their everyday work are available and appropriate for the central issues of legal ethics."²⁵ My primary concern with Simon's justice-as-law standard is that law can be dangerous. It can be used for evil as well as for good. As Augustine noted long ago, governments can be little more than criminal gangs.²⁶ Countries, like gangs, may adopt laws that are not so good, and the United States is not immune from this malady. During its history, American law has at times supported slavery, sexism, segregation, exploitation of immigrants, suppression of organized labor, paternalism, and imperialism. Decisions during legal representation should not be based on such values or their modern counterparts. A hundred years from now, some of our legal values (individualism, harsh criminal punishment, nationalism, and materialism) may seem as obviously wrong as our country's prior wrongs now appear to us. At times we need prophetic insight. Law is unlikely to be a source of prophetic insight. Law can be a source of injustice. Justice should be our source of law, not law our source of justice.

The law of professional responsibility can be a source of injustice. Consider the Leo Frank case, which Simon discusses.²⁷ In the early 1900s, Leo Frank was convicted in Georgia of the murder of a young girl. Arthur Powell, a Georgia lawyer, learned from a client that Leo Frank had been wrongfully convicted. Powell, on the grounds of client confidentiality, did not reveal the information to the authorities. A vigilante mob killed Frank while he was in prison. According to the confidentiality rules of the legal profession, Powell acted properly.²⁸ The law governing lawyers led to the most unjust of results.

Simon seeks to rescue his justice-as-law theory by arguing that Powell

25. SIMON, *supra* note 5, at 18.

26. AUGUSTINE, CONCERNING THE CITY OF GOD AGAINST THE PAGANS 139 (Henry Bettenson trans., 1972). Augustine noted:

[I]t was a witty and truthful rejoinder which was given by a captured pirate to Alexander the Great. The king asked the fellow, 'What is your idea, in infesting the sea?' And the pirate answered, with uninhibited insolence, 'The same as yours, in infesting the earth! But because I do it with a tiny craft, I'm called a pirate: because you have a mighty navy, you're called an emperor.'

Id.

27. SIMON, *supra* note 5, at 217 n.3 (discussing ARTHUR POWELL, I CAN GO HOME AGAIN 287-92 (1943)). For Simon's discussion of the Frank case, see SIMON, *supra* note 5, at 4, 163-64, 222 n.9.

28. SIMON, *supra* note 5, at 7.

should have revealed the secret “as an act of principled commitment to legal values more fundamental than those that support the rule.”²⁹ Here, Simon speaks in his moralistic voice, discussed in the following section, rather than his legalistic voice. But if a lawyer takes seriously Simon’s claim that legal values, discerned by the “modes of analysis . . . that lawyers habitually employ in their everyday work” are to control the lawyer’s decisions, he or she is likely to keep such information confidential. Georgia’s duly constituted body, the state bar association, with the approval of the state supreme court, had adopted a confidentiality rule that precluded Powell from revealing his client’s statements. Legal precedent was strong. Every state had (and continues to have) a rule protecting the confidentiality of this information. States have retained the broad confidentiality rule, in spite of the example of the Frank case. Not only have courts and bar associations adopted and retained a broad confidentiality rule, but they also have frequently heaped high praise on it.³⁰ I think that the moral arguments for revealing Frank’s innocence, the importance of human life, and protecting the innocent, justify a lawyer revealing this information, but “legal values” appear to be on the side of not revealing it.³¹

A second concern with Simon’s justice-as-law standard is that law is often indeterminate.³² Simon’s standard would not give clear guidance to lawyers in many cases. The problem of indeterminacy is illustrated by the Frank case discussed above. As I argued, Simon’s legal ideals standard could easily lead a lawyer to keep the information in the Frank case confidential, though Simon concludes that the standard points in the opposite direction.

29. SIMON, *supra* note 5, at 164.

30. See, e.g., *A. v. B.*, 726 A.2d 924, 926 (N.J. 1999) (characterizing the confidentiality rule as “crucial” to the attorney-client relationship, imposing a “sacred trust” on the attorney); *In re Ethics Advisory Panel Opinion No. 92-1*, 627 A.2d 317, 322 (R.I. 1993) (reflecting the Rules of Professional Conduct drafters’ belief that the confidentiality rule “is central to the attorney-client relationship”); *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850, 560 (W. Va. 1995) (noting that the confidentiality rule “serves to vindicate the trust and reliance” on the part of clients that if not protected “would undermine public confidence in the legal system”).

31. Simon acknowledges that “most lay people would find [the problem] (correctly in my [Simon’s] view) a simple one with an obvious answer” whereas legal attempts to identify an exception to the confidentiality rule have been “tortuous.” SIMON, *supra* note 5, at 218 n.6 (citing Symposium, *Executing the Wrong Person: The Professionals’ Ethical Dilemmas*, 29 LOY. L.A. L. REV. 1543 (1996)). No doubt, the lay people would address the problem as a moral issue.

32. That law is often indeterminate is one of the insights of the critical legal studies movement (“CLS”), which Simon credits with influencing him. See SIMON, *supra* note 5, at 247. Worse, as those in the CLS movement have also noted, legal language (including legal ideals) often masks the fact that it protects the strong at the expense of the weak.

B. The Moralistic Simon: Law as Morality

Whereas the legalistic Simon suggests that the lawyer should resolve issues arising in the law office based on law discerned by the usual methods of legal analysis, in other places a moralistic Simon scoffs at traditional legal interpretation. Simon is critical of what he calls the "positivist premise" that "legal norms are identified, procedurally, by their lineage to some organ of the state, and substantively, by the fact that they are commands or prohibitions backed by sanctions."³³ According to Simon, a positivist is one who "insist[s] on some distinction between law and other types of norms."³⁴

In contrast, Simon (drawing from Ronald Dworkin's theory of judicial decision making) defines law as morality. Simon prefers the substantivist to the positivist view.

[The substantive conception of law] interprets specific legal norms as expressions of more general principles that are indissolubly legal and moral. It acknowledges the jurisdictional rules that Positivism regards as preeminent, but it regards them differently. First, it does not regard them as independent or ultimate social facts, but as expressions of underlying values, such as order, fairness, and democracy, and it insists on

33. SIMON, *supra* note 5, at 37.

34. SIMON, *supra* note 5, at 80. "So all Positivists will sometimes find themselves in situations of tension between the norms they identify as legal and other norms." SIMON, *supra* note 5, at 80-81. Simon accuses most of those with whom he disagrees—both those who advocate that lawyers exercise moral (rather than legal) judgment, *see* SIMON, *supra* note 5, at 15-18, and those who advocate the Dominant View, *see* SIMON, *supra* note 5, at 27—of being positivists. Simon's definition of positivism is far broader than most would accept. Under Simon's almost all encompassing definition of "positivism," most natural law theorists—generally thought to be the opposite of the positivists—would fall in the positivist camp. Under Simon's definition, even John Finnis would be a positivist. John Finnis is one of the most prominent proponents of natural law theory. "No work has done more to revitalize the natural law tradition in the English-speaking world than John Finnis's *Natural Law and Natural Rights* (1980)." GEORGE C. CHRISTIE & PATRICK K. MARTIN, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 193 (1995). Finnis recognizes a distinction between law and morals. For example, Finnis gives significant attention to the question whether one has a moral obligation to obey "unjust laws" (a phrase which for Simon would be an oxymoron). *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 351-68 (1980). Finnis finds in a number of situations that there is not such an obligation. *Id.* at 360-62. Indeed, Finnis is critical of those who refuse to use the term "law" to refer to the rules of courts and legislatures. *See infra* note 50.

Ironically, there is a danger that Simon's deference to legal values will bring in the nightmare of positivism—blind compliance with immoral law. *See supra* text accompanying notes 25-27.

interpreting the rules in light of these values. Second, it denies that jurisdictional principles that prescribe the allocation of authority for dispute resolution are more fundamental than substantive principles that prescribe the just ordering of the social world.³⁵

Simon identifies several substantivist theories: “[libertarianism,] utilitarianism, wealth maximization, social rights theories such as that of John Rawls, neo-Aristotelian theories of personal virtue, [and] coherence theories such as that of Ronald Dworkin.”³⁶ These theories, of course, are far from the ordinary tools that lawyers use to discern the law. In this second expression of Simon’s model, “legal ideals”³⁷ override ordinary legal values. This moralistic Simon would have lawyers determine the law based on the “substantive principles that prescribe the just ordering of the social world,”³⁸ rather than the decisions of legislatures and judges. This Simon picks and chooses his sources of law in a way that is far from usual in legal analysis. At times the legal support for the positions that Simon suggests a lawyer should take is thin or nonexistent. Consider a few examples.

As noted previously, despite the fact that there is a long history among courts and bar associations of strong support for a broad confidentiality rule, Simon argues that the lawyer who learns from a client that an innocent man has been convicted should ignore the confidentiality rule and disclose the exculpatory information.³⁹ Simon insists that he is making a legal judgment,⁴⁰ but his analysis is long on moral judgment and short on legal support. His language is the language of morality. According to Simon, application of the confidentiality rule in the innocent convict case would be “absurd[.]”⁴¹ Failure to disclose exculpatory facts “would be grotesque.”⁴² A “rule forbidding

35. SIMON, *supra* note 5, at 82.

36. SIMON, *supra* note 5, at 82.

37. In looking to “legal ideals,” Simon follows Dworkin’s theory of judicial decision making. Dworkin suggests that decisions must be based on the “moral principles that underlie the community’s institutions.” RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 160 (1979). Dworkin acknowledges that this search “must carry the lawyer very deep into political and moral theory.” *Id.* at 66-67.

38. SIMON, *supra* note 5, at 82; *supra* text accompanying note 35.

39. See SIMON, *supra* note 5, at 164. I agree with Simon that the lawyer should reveal the information, but as a matter of moral judgment, rather than legal judgment.

40. “[T]he lawyer should defy the rule, not as an act of lawlessness, but as an act of principled commitment to legal values more fundamental than those that support the rule.” SIMON, *supra* note 5, at 164.

41. SIMON, *supra* note 5, at 164.

42. SIMON, *supra* note 5, at 164.

disclosure would be degrading. . . ."⁴³ Simon cites no legal sources that justify revealing the confidential information.

A second example of Simon appearing to follow morals rather than the law is his differing treatment of one client's tax avoidance problem and another client's welfare benefits problem. In both cases, obtaining the benefit for the client would be contrary to the intent of the statute.⁴⁴ In the tax case, Simon argues that the lawyer "should not proceed with a plan that would frustrate [the purpose of the tax law]."⁴⁵ In the welfare case, Simon argues that the lawyer

might be justified in disregarding [the purpose of the statute] if she thought it problematic. A purpose is problematic if it endangers fundamental values. The lawyer might decide that the claimant's interest in a minimally adequate income is a value of exceptional legal importance, that the AFDC grant levels provide considerably less than a minimally adequate income, and the plan in question might move her closer to one.⁴⁶

In the welfare case, Simon strains to find support for the conclusion that the right to adequate income is a fundamental *legal* value. Citing two 1970 decisions, Simon argues, "Although the Supreme Court has denied that rights to minimal subsistence are 'fundamental' in some contexts, it has recognized them as exceptionally important."⁴⁷ In addition, he argues that if the state benefits are below the federal poverty standard, the federal poverty standard might serve as *legal* support for seeking the benefit.⁴⁸ Given such weak legal support, it is apparent that Simon's conclusion is based more on moral values than legal values. The fact that he can find some legal support does not mean that his decision is *based on* legal values. It is one thing to argue that lawyers should point to legal values to justify what they do. It is quite another to argue, as Simon does, that lawyers should be controlled by legal values.

Simon argues that to discern what is moral is to discern the law. On this basis, he is able to argue that a lawyer always has a duty to obey "the law."

The duty to obey follows more or less straightforwardly from the definition [of the law]. Any argument for disobedience against a

43. SIMON, *supra* note 5, at 164.

44. Simon initially assumes that the purpose of the welfare statute is unclear. In such circumstances, he finds it appropriate for the lawyer to pursue the benefit for the client. See SIMON, *supra* note 5, at 148. I address his last variation on the welfare problem. In it, "the lawyer found stronger indication of a purpose to preclude" the client from getting the benefit. SIMON, *supra* note 5, at 148-49.

45. SIMON, *supra* note 5, at 147.

46. SIMON, *supra* note 5, at 148-49.

47. SIMON, *supra* note 5, at 149.

48. See SIMON, *supra* note 5, at 149.

particular command would also be an argument that the command was an incorrect interpretation of the law.⁴⁹

Simon conflates legal judgment and moral judgment. If the command of a state is immoral, it is not law; and as a matter of law, the lawyer should not obey it.

Others recognize that the term “law” can be used in this ideal sense, but also acknowledge that it can be used (and generally is used) to refer to rules adopted by legal bodies (irrespective of the morality of those rules).⁵⁰ Of course, definitions have consequences, and a lawyer’s definition of law will have consequences in the law office. It appears that Simon views (and would present to clients) moral advice as legal advice. He is critical of those of us⁵¹ who argue that moral judgment is separate from legal judgment and that the lawyer should address many issues of legal ethics as moral (rather than legal) issues. I will

49. SIMON, *supra* note 5, at 85.

50. John Finnis, one of today’s strongest advocates that law should embody moral content, says, “It is not conducive to clear thought, or to any good practical purpose, to smudge the positivity of the law by denying the legal obligatoriness *in the legal or intra-systemic sense* of a rule recently affirmed as legally valid and obligatory by the highest institution of the ‘legal system.’” FINNIS, *supra* note 34, at 357.

In Simon’s suggestion that the test for legal validity is moral validity, he appears to embody the caricature of natural law that so many (true) positivists (John Austin, Joseph Raz, H.L.A. Hart, and Hans Kelson) have attacked. See FINNIS, *supra* note 34, at 26. For example, John Austin argues:

[I]f I object to [the imposition of a death sentence for “an act innocuous, or positively beneficial”], that it is contrary to the law of God . . . the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity.

FINNIS, *supra* note 34, at 355 (quoting Austin).

Simon’s proposal that lawyers while advising clients ignore the common perception of law is particularly troubling. It would be one thing for Simon to submit to the punishment of the state, taking comfort in the belief that he had violated no “law.” However, Simon’s lawyer should be careful about failing to advise a client of a state’s (immoral) command on the basis that it is no “law.”

I refer to the law-as-morality position as a caricature of natural law, because, as John Finnis has noted, the critics of natural law do not cite any natural lawyers who fit such a description, nor does Finnis know of any. See FINNIS, *supra* note 34, at 26. As Finnis notes, natural law advocates have differentiated between the “focal meaning” or “ideal type” of a concept and its “undeveloped, primitive, corrupt, deviant” uses. The term “law” can be used of the ideal, but it can also be used of mere commands. FINNIS, *supra* note 34, at 9-11. The phrase “an unjust law is no law,” which is at times attributed to natural lawyers, uses the term “law” in both senses. An “unjust law” is a law in a sense, but it is “no law” in the ideal sense. FINNIS, *supra* note 34, at 363-65 (discussing Aquinas’s use of various senses of the term “law”).

51. Simon puts David Luban, Thomas Shaffer, and me in this camp. See SIMON, *supra* note 5, at 16-17.

consider Simon's criticisms of this position in the following section.⁵² But first I consider Simon's morality-as-law proposal. I see several problems with it.

First, there is a danger that clients will misunderstand what they are getting from Simon's lawyer. Simon's definition of law-as-morality is different from the common understanding. The client is likely to understand "the law" to be what those legal bodies that have jurisdiction over him require him to do. Suggesting that, as a matter of a client's *legal* responsibility, the client must respect the interests of a third party or the public when the state does not require such protection, is likely to mislead clients.

Most people believe that when they hire a lawyer, the lawyer will tell them what the state requires them to do. It appears that Simon's lawyer would tell them what "[the] substantive principles that prescribe the just ordering of the social world"⁵³ require them to do. Simon wants his lawyer's moral judgment to have the authority of the law. I will argue in the following section that the lawyer should discuss such issues with clients as matters of moral responsibility,⁵⁴ but if the state does not require a client to do "X," the lawyer should not lead the client to believe that it does. If a lawyer follows Simon's model of lawyering, she should explain to clients the difference that is likely to exist between the lawyer's and the client's understandings of the word "law."

A second concern is that Simon's lawyer is likely to be authoritarian. Simon's criteria—whether "law," "legal values," or "legal ideals"—for determining the lawyer's actions are beyond the understanding of the ordinary client. Under Simon's model, decision making in the law office becomes the province of the legal expert. Simon's lawyer is likely to control the client in areas where I believe the client should maintain control—areas where organs of the state have not chosen to exercise control. One of the things that lawyers do is empower people. They enable clients to know what the legislature and the courts require of them. Generally, lawyers should expand, not limit, the client's power. Simon argues that lawyers should have this opportunity to exercise moral agency,⁵⁵ but Simon's system would rob clients of the opportunity to exercise moral agency. As between the lawyer and the client, the client generally should control decisions made in the law office. Part III of this essay provides further discussion of authoritarian lawyering.⁵⁶

A third and related concern is that Simon's system is likely to stifle moral discourse. It would give lawyers responsibility for decisions that clients currently make in consultation with their lawyers.⁵⁷ We can only grow (as

52. See *infra* text accompanying notes 67-83.

53. SIMON, *supra* note 5, at 82.

54. See *infra* text accompanying notes 67-83.

55. See SIMON, *supra* note 5, at 114.

56. See *infra* text accompanying notes 85-101.

57. Under the professional rules that are currently in effect in most jurisdictions, the client controls the ends of the representation, and the lawyer, in consultation with the client, controls the means. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a)

individuals and as a society) in our ability to exercise moral deliberation as we exercise our moral muscles. Lawyers should not remove the responsibility for that exercise from clients. Lawyers and clients are more likely to thoughtfully engage in moral discussion if they acknowledge that they face moral issues, rather than muddying the waters by describing them as “legal” issues. We need to rediscover the ability to talk about moral values, not substitute legal values for them.⁵⁸

Finally, “the substantive principles that prescribe the just ordering of the social world” on which Simon’s moralist lawyer relies to resolve issues in the law office are likely to be even less determinate than the “legal values” on which Simon’s legalist lawyer relies. As noted previously, Simon identifies several substantivist theories of law: libertarianism, utilitarianism, wealth maximization, liberalism, and virtue ethics.⁵⁹ Each of these schools of philosophy has different understandings of “the substantive principles that prescribe the just ordering of the social world.” Each has a different perception of justice. We are back to Alasdair MacIntyre’s question: “Whose Justice?” Ronald Dworkin, on whom Simon relies for his law-as-morality theory,⁶⁰ argues that judges should look to a society’s shared moral principles first in determining the law. But, as MacIntyre has argued in response to Dworkin, “our society as a whole has none.”⁶¹

Given the broad range of sources that Simon cites as potential sources of substantive doctrine, it is likely that different lawyers will identify very different “legal ideals.” How will a lawyer who finds the law in the “substantive principles that prescribe the just ordering of the social world” advise clients? Will a pro-life lawyer tell a client that the law precludes her from having an

(1999).

58. As noted previously, Simon bases his law-as-morality definition on Ronald Dworkin’s theory of judicial decision making. There is an analogy between the responsibility that Dworkin gives to judges and the responsibility that Simon gives to lawyers. In Dworkin’s judicial model, judges make decisions based on the “principles” underlying legislation, rather than the language or intent of the legislature. See FINNIS, *supra* note 34, at 356 (citing DWORKIN, *supra* note 37, chs. 2-4). Dworkin gives judges power to determine law and to ignore legislatures. Simon gives lawyers power to determine law and to ignore both legislatures and judges. The danger is that Simon and Dworkin undercut the important role that persuasion should play both in democracies and in relationships.

59. See SIMON, *supra* note 5, at 82.

60. See SIMON, *supra* note 5, at 39, 82, 247.

61. ALASDAIR MACINTYRE, *AFTER VIRTUE* 236 (1981). MacIntyre cites *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (holding by a 5-4 vote that state educational institutions could take race into consideration in admissions, but by a different 5-4 majority held that they could not set aside specific places for minority applicants) to illustrate that the United States Supreme Court is more likely to serve as a “peacekeeping or truce-keeping body by negotiating its way through an impasse of conflict, not by invoking our shared moral first principles.” MACINTYRE, *supra*, at 236.

abortion, when the Supreme Court gives her that right? Will an environmentalist lawyer tell a client that the law precludes him from polluting, when the legislature has created an exemption for the client's pollution? The indeterminate nature of legal ideals compounds my earlier concern with the authoritarian nature of Simon's lawyer. The lawyer is likely to choose legal ideals based on *her* moral values. It will not necessarily be legal ideals that control the client; it is likely to be the lawyer's ideals.

The indeterminate nature of a legal ideals standard is illustrated by the differing answers that such a standard would give to the central issue of Simon's book: What should be the role of lawyers? As Simon acknowledges, if we look to the law of lawyering, we find little support for Simon's view. The law of lawyering tends to support the Dominant View.⁶² Simon spends much of his book challenging this aspect of the law of lawyering. Simon argues that we should look to legal ideals to control the lawyer's actions, but even if we look beneath the rules, to the "legal ideals" of the law of lawyering, we find a wide variety of views. Simon argues eloquently that lawyers should pursue the legal ideal of justice, but no more eloquently than others argue that lawyers should pursue the legal ideal of client autonomy. Monroe Freedman, Simon's primary example of the "Dominant View" of lawyering,⁶³ says:

One of the essential values of a just society is respect for the dignity of each member of that society. Essential to each individual's dignity is the free exercise of his autonomy. Toward that end, each person is entitled to know his rights with respect to society and other individuals, and to decide whether to seek fulfillment of those rights through the due processes of law. . . .

[T]he attorney acts both professionally and morally in assisting clients to maximize their autonomy. . . . [T]he attorney acts unprofessionally and immorally by depriving clients of their autonomy, that is, by denying them information regarding their legal rights, by otherwise preempting their moral decisions, or by depriving them of the ability to carry out their lawful decisions.⁶⁴

Both Freedman and Simon ground their systems in legal ideals. Freedman grounds his views in the Constitution, and contrasts his views (as Simon contrasts Simon's views⁶⁵) with those who find the basis for lawyering in moral

62. See SIMON, *supra* note 5, at 7-8.

63. See SIMON, *supra* note 5, at 243 (citing MONROE FREEDMAN, UNDERSTANDING LEGAL ETHICS (1990)).

64. FREEDMAN, *supra* note 63, at 57; see also Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1073 (1976); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

65. See SIMON, *supra* note 5, at 17.

philosophy.⁶⁶ Obviously, Freedman's legal ideals differ from those of Simon. It does not appear that legal ideals give a clear answer, even to the issue of what model of lawyering the lawyer should adopt.

C. *The Alternative: Explicit Moral Judgment*

The alternative to Simon's lawyer's "legal judgment" is the explicit exercise of moral judgment. Simon conflates legality and morality, but the general understanding is that there is a difference between the two. The law requires some things of people, but leaves much to the client's and the lawyer's discretion.⁶⁷ This area of discretion should be a place for the exercise of explicit moral judgment in the law office. In Stephen Pepper's words, the place for lawyers' ethics is, "in the gap between law and justice."⁶⁸ The lawyer should explain to a client the requirements of legislatures, administrative agencies, and courts and discuss with the client what the client should do in the area in which the law grants discretion.⁶⁹

Simon makes several criticisms of those of us who have advocated that issues in the law office be resolved based on moral judgment.⁷⁰ His first criticism is that such morality is "personal";⁷¹ it is based merely on the "personal

66. "Professor Shaffer thinks of lawyer's ethics as being rooted in moral philosophy, while I think of lawyers' ethics as being rooted in the Bill of Rights as expressed in the American adversary system." FREEDMAN, *supra* note 63, at 7. Simon also argues that his views of legal ethics are grounded in law in contrast to the views of Shaffer, David Luban, and me, which Simon argues are grounded in a "role moral" argument. See SIMON, *supra* note 5, at 15-17.

67. This is not to suggest that law is separate from morality in the sense that the positivists argue. Most law is based on a moral understanding and imposes some sort of moral judgment. In order to discern what the law is, the lawyer must understand the morality underlying the law. Legislatures and courts use terms and concepts that cannot be understood except in light of their moral foundation. Nevertheless, legislatures and courts do not seek to control every, or even most, moral issues. They leave a significant area for the exercise of discretion.

68. Stephen L. Pepper, *Lawyers' Ethics in the Gap Between Law and Justice*, 40 S. TEX. L. REV. 181 (1999).

69. I do not mean to suggest that this area of discretion is the only area for lawyer-client moral discourse. In the case of a law of questionable morality, the lawyer and client may have a moral responsibility to determine whether civil disobedience is justified.

70. See SIMON, *supra* note 5, at 16 & 218 n.16.

71. See SIMON, *supra* note 5, at 15-18. This is a substantial change from Simon's earlier position. In a 1978 law review article, Simon encouraged lawyers to act based on their personal ethics. He argued for what he called "non-professional advocacy." Simon stated: "The foundation principle of non-professional advocacy is that the problems of advocacy be treated as a matter of *personal* ethics. . . . [P]ersonal ethics require that individuals take responsibility for the consequences of their decisions. They cannot defer

predispositions of various individuals.”⁷² Simon argues that decisions in the law office should be based on legal values, “values solidly grounded in the public culture of the society and the legal system.”⁷³

In his characterization of moral judgment as either “personal” or “public,” Simon reflects modernism’s notion of morals. Simon’s world has two forms of morality: the “personal predispositions of various individuals” and “values solidly grounded in the public culture of the society and the legal system.”⁷⁴ However, as Alasdair MacIntyre has shown, moral insight is likely to be the product, not of the individual or of the mega-community, but of intermediate communities and their traditions of moral analysis.⁷⁵ For example, Martin Luther King, Jr.’s civil rights movement was not primarily the product of “individual preferences” or of the public culture, but of a prophetic religious community’s long history of moral discourse.⁷⁶ It may be that a lawyer who exercises moral judgment will merely draw on her personal views, but I hope that she will draw from richer traditions of moral analysis.

Simon argues that the judgments of lawyers on moral issues can often be characterized as either moral or legal judgments, and he argues, on what appear to be pragmatic grounds, that it is best to characterize them as legal judgments.⁷⁷ Simon suggests that those of us who argue for explicit moral judgment weaken the impact of our moral judgment by not labeling it “legal judgment.”⁷⁸ According to Simon, characterizing a decision as a legal judgment “suggests that the matter is susceptible to resolution in terms of the analytical methods and sources of legal argument. While these methods and sources are loose, they are typically thought to be more structured and grounded than popular moral discourse.”⁷⁹ Simon’s implicit criticism of moral judgment is that it is typically thought to be loose, unstructured, and ungrounded. (Note that Simon does not here say that legal judgments *are* structured and grounded; only that they are “*thought to be*” so.)⁸⁰ Simon goes on to say that the characterization of moral

to institutions with autonomous ethical momentum.” William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 131.

72. See SIMON, *supra* note 5, at 17. At times, he seems to withdraw his criticism. “[Those who argue that the lawyer should exercise moral judgment] recognize that the values competing with client interests in the core instances of legal ethics are not just subjective predispositions.” SIMON, *supra* note 5, at 17.

73. SIMON, *supra* note 5, at 17.

74. SIMON, *supra* note 5, at 17.

75. See MACINTYRE, *supra* note 61, at 221.

76. See, e.g., Martin Luther King, Jr., *Letter From Birmingham City Jail*, in THE RHETORIC OF THE CIVIL-RIGHTS MOVEMENT 37 (Haig A. Bosmajian & Hamida Bosmajian eds., 1969).

77. See SIMON, *supra* note 5, at 102.

78. SIMON, *supra* note 5, at 102.

79. SIMON, *supra* note 5, at 102.

80. SIMON, *supra* note 5, at 102 (emphasis added).

judgment in the law office as moral judgment has led to the perception of it as "subjective and peripheral" to the lawyer's business.⁸¹ "The tools offered in popular culture for considering moral problems seem too formless and subjective; those offered by academic philosophy seem too abstract and multifarious."⁸² If Simon is right, neither our popular culture nor our teachers of moral philosophy have served us well.

The thing that is most troubling about Simon's book is his suggestion that respect for moral judgment has sunk so low that we must label it "legal judgment" before people will give it weight. As Martin Luther King, Jr. taught us, moral values are more important than legal values. In his "Letter from Birmingham City Jail," King declared that a "just law is a man-made code that squares with the moral law or the law of God."⁸³ For King, moral values stood in judgment of legal values. King and his lawyers used the law, but there was never much doubt that their moral direction came from elsewhere. If the reputation of moral analysis has sunk as low as Simon suggests, we should work to renew our tools of moral analysis, not retreat to the legal barricades.

My view is that moral analysis has greater respect among the public than Simon suggests. In spite of the influences of the relativists of popular culture and academic moral philosophy, when you ask people, "What would be fair?," most are likely to have a thoughtful answer. The values that they have learned from their homes, churches, and synagogues and the empathy that they feel when they consider other people are more likely than Simon suggests to lead them to justice. Lawyers should identify moral issues as moral issues and encourage clients to make decisions based on their deepest moral values. I will discuss the means by which lawyers might raise and discuss such issues with clients through a collaborative model of client counseling in Part III of this essay.⁸⁴

III. DECISION MAKING IN THE LAW OFFICE

Simon at times heralds a legalistic lawyer whose choices are controlled by "legal judgments grounded in methods and sources of authority of the professional culture"⁸⁵ and at other times heralds a moralistic lawyer whose choices are controlled by "the substantive principles that prescribe the just ordering of the social world."⁸⁶ One problem with both of Simon's lawyers is

81. SIMON, *supra* note 5, at 102.

82. SIMON, *supra* note 5, at 18.

83. Martin Luther King, Jr., *Letter from Birmingham Jail*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 289, 293 (James M. Washington ed. 1986), *quoted in* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 38 (1993).

84. See *infra* text accompanying notes 112-19.

85. See SIMON, *supra* note 5, at 138.

86. See SIMON, *supra* note 5, at 82.

that they appear to have no place for the client's values. Under Simon's models, issues in the law office are issues for legal specialists. Anthony Kronman's recent book on the loss of meaning in law practice is entitled *The Lost Lawyer*;⁸⁷ Simon's book might have been entitled *The Lost Client*.

In giving the responsibility for resolving moral issues in representation to the lawyer, Simon's models run counter to the client-centered model of counseling that has dominated legal education for the last twenty years, and returns to the authoritarian model of an earlier era. In this Part, I will identify Simon's place among these lawyer/client models. Finally, I will suggest a collaborative model of legal counseling that draws on the resources of both lawyer and client.

A. The Authoritarian Tradition

As noted in Part I, in some respects Simon patterns his model of lawyering on that of the early gentleman-lawyers, David Hoffman and George Sharswood.⁸⁸ Like Simon, they considered the lawyer to be responsible for justice. David Hoffman said that a lawyer should not advocate a legal position unless he believes that the position is good for the country. "[S]hould the principle . . . be wholly at variance with sound law," he said, "it would be dishonorable folly in me to endeavor to incorporate it into the jurisprudence of the country."⁸⁹

Hoffman and Sharswood trusted lawyers, but they did not trust clients. Sharswood said, "It is in some measure the duty of counsel to be the keeper of the conscience of the client; not to suffer him, through the influence of his feelings or interest, to do or saying anything wrong in itself, and of which he would himself afterwards repent."⁹⁰ Hoffman disapproved of lawyers who

87. KRONMAN, *supra* note 1. Kronman mourns the fact that lawyers no longer seem to be involved in meaningful decision making in the law office. Clients (and partners) increasingly give lawyers narrower and narrower assignments, making it difficult for lawyers to exercise and develop the practical wisdom that is the most meaningful aspect of law practice. See KRONMAN, *supra* note 1, at 283-91, 299-307.

Simon complains that Kronman's book has almost no examples of lawyers in ordinary practice. See SIMON, *supra* note 5, at 23-25. Simon's book shares a similar shortcoming. His book has no examples of client/lawyer interactions, and he does not discuss how his project might affect clients.

88. See *supra* text accompanying notes 11-15; see also William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1134-35 (1988). For commentary on Hoffman and Sharswood and substantial excerpts from their writings on lawyers, see SHAFFER, *supra* note 11, at 59-164, 169-70, 177-80, 197-206, 220-31, 337-39, 354-59.

89. DAVID HOFFMAN, *Resolutions on Professional Deportment, No. XIV*, in II A COURSE OF LEGAL STUDY 752, 755 (2d ed. 1836), quoted in Shaffer, *supra* note 11, at 64.

90. GEORGE SHARSWOOD, *ESSAY ON PROFESSIONAL ETHICS* (1854), quoted in SHAFFER, *supra* note 11, at 225.

invoke statutes of limitation or the law of infancy to defeat otherwise valid contract claims. Of the client who wants to raise such a defense, Hoffman said, "He shall never make me a partner in his knavery."⁹¹

Judge Clement Haynsworth, a modern gentleman-lawyer, reflected similar sentiments to a law school graduating class:

[The lawyer] serves his clients without being their servant. He serves to further the lawful and proper objective of the client, but the lawyer must never forget that he is the master. He is not there to do the client's bidding. It is for the lawyer to decide what is morally and legally right, and, as a professional, he cannot give in to a client's attempt to persuade him to take some other stand. . . . During my years of practice, . . . I told [my clients] what would be done and firmly rejected suggestions that I do something else which I felt improper. . . .⁹²

In his 1974 study, *Lawyer and Client: Who's In Charge?*,⁹³ Douglas Rosenthal found that lawyers were in charge.⁹⁴ He found that the lawyer "exercise[d] predominant control over and responsibility for the problem-solving delegated to him rather passively by the client."⁹⁵ Lawyers assumed that the solutions to legal problems were primarily technical and that they were the experts in the technical skills needed to reach the correct conclusion.⁹⁶

But there was a big difference between the authoritarian lawyers of Hoffman and Sharswood and the authoritarian lawyers that Rosenthal discovered. Hoffman's and Sharswood's lawyers were controlled by moral considerations; Rosenthal found that the modern authoritarian lawyers ignored moral considerations. As one client said of his lawyer after the lawyer advised him to seek substantial damages for a modest injury:

[T]he lawyer is a reassuring presence who takes away your guilt feelings. He says, "Hey, this is the way the game is played; you take as much as you can get; it's what they expect; it's the way it's done." He takes upon his own shoulders the burden of your guilt—he's the professional.⁹⁷

91. HOFFMAN, *supra* note 89, at 754.

92. Clement F. Haynsworth, Jr., *Professionalism in Lawyering*, 27 S.C. L. REV. 627, 628 (1976).

93. DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974).

94. Rosenthal referred to this as the traditional model.

95. ROSENTHAL, *supra* note 93, at 2.

96. See ROSENTHAL, *supra* note 93, at 169.

97. ROSENTHAL, *supra* note 93, at 171.

If the traditional authoritarian lawyer was a guru, ensuring that clients acted morally, the modern authoritarian lawyer is a godfather, protecting client interests at the expense of others.⁹⁸

In some respects, Simon wants to return to the traditional lawyer, the lawyer who ensures that clients pursue justice. But Simon adds a new twist. The traditional lawyer was confident that he knew what justice was; Simon's lawyer is not so confident. Simon's lawyer determines justice based on legal values. As with Rosenthal's lawyers,⁹⁹ legal problems become primarily technical problems for the lawyer, for in Simon's formulation, "justice" is a highly technical legal issue for experts.¹⁰⁰ Simon's models place moral judgment on the lawyer's turf.

As I suggested in a previous section, authoritarian models of lawyering are inconsistent with client dignity.¹⁰¹ The authoritarian lawyer interferes with the client's control of his life. Legal representation should increase that control, not limit it. Humility is justified when approaching the moral issues that arise in the law office. None of us has perfect ability to discern the good. There is a danger that lawyers will be confident of their moral judgment (or in Simon's case, of the law's moral judgment) when confidence is not justified.

B. The Client-Centered Counselor

For the past twenty years, the primary alternative to the authoritarian lawyer has been the client-centered legal counselor.¹⁰² According to the leading client-centered counseling text, client-centered counseling

involves having clients actively participate in identifying their problems, formulating potential solutions and making decisions. Thus,

98. The reference is to the godfather of the Mario Puzo novel and the Francis Ford Coppola films. For a discussion of guru and godfather lawyers, see SHAFFER & COCHRAN, *supra* note 1, at 30-39, 5-14.

99. See ROSENTHAL, *supra* note 93, at 169.

100. When we look at some of the standards that Simon wishes lawyers to employ in addressing these problems, the technical, legal nature of his project is apparent. He analyzes the ethical issues that lawyers face in terms of three tensions: substance versus procedure, purpose versus form, and broad versus narrow framing. See SIMON, *supra* note 5, at 139-56. For a discussion of the highly technical nature of the determination that Simon envisions, see David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 893-95 (1999). Luban suggests that the analysis is so technical ("exceedingly professorial") that lawyers are unlikely to engage in it. *Id.* at 894.

101. See *supra* text accompanying notes 55-56.

102. See BASTRESS & HARBAUGH, *supra* note 17; DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977); BINDER ET AL., *supra* note 18.

client-centered lawyering emanates from a belief in the autonomy, intelligence, dignity, and basic morality of the individual client.¹⁰³

Client-centered counseling focuses on the desires of the client. "Because client autonomy is of paramount importance, decisions should be made on the basis of what choice is most likely to *provide a client with maximum satisfaction*."¹⁰⁴ In this respect, the client-centered model incorporates the Dominant View of law practice of which Simon is so critical.¹⁰⁵ In the client-centered view, the lawyer should not act in ways that would influence the client's choice. The lawyer should be "neutral"¹⁰⁶ and "nonjudgmental."¹⁰⁷ Whereas the client has a very limited role in the authoritarian model, the lawyer has a very limited role in the client-centered model.

When a decision is to be made during the representation, the client-centered lawyer and client list on a sheet of paper all of the alternative courses of action and the "consequences to the client" of each.¹⁰⁸ The lawyer identifies each potential consequence as either an advantage or a disadvantage to the client,¹⁰⁹ and the client chooses from the options.

The biggest problem with the client-centered model is that clients consider only consequences *to the client*. This ignores the importance of other people. Justice is not a concern of the lawyer or the client. In the illustration that one client-centered book gives of the client-centered counseling method, a client is considering suing his neighbor for a zoning violation. The authors suggest that the lawyer ask, "How important to the client is his friendship with [the neighbor]?"¹¹⁰ Under this model, the client considers the consequences to the neighbor solely in light of the effect that they will have on the client; it gives the neighbor no independent moral significance. The counseling plan suggests that if the neighbor is not a friend or if the client's friendship with the neighbor is not important, the neighbor is not worthy of consideration.¹¹¹

103. See BINDER ET AL., *supra* note 18, at 18 (footnote omitted).

104. BINDER ET AL., *supra* note 18, at 261; *see also* BASTRESS & HARBAUGH, *supra* note 17, at 256.

105. It is not clear that the lawyers who hold what Simon describes as the Dominant View would necessarily allow clients to control decisions in the law office. They might play the godfather, controlling decisions for the client and ignoring the interests of others.

106. BINDER & PRICE, *supra* note 102, at 166; BINDER ET AL., *supra* note 18, at 288-89.

107. BASTRESS & HARBAUGH, *supra* note 17, at 57.

108. BASTRESS & HARBAUGH, *supra* note 17, at 246-48; BINDER & PRICE, *supra* note 102, at 184-85; BINDER ET AL., *supra* note 18, at 307.

109. BINDER & PRICE, *supra* note 102, at 168.

110. BASTRESS & HARBAUGH, *supra* note 17, at 246.

111. The client-centered counselors suggest that the lawyer might legitimately raise moral concerns when the client makes a decision that the lawyer believes is "morally

The client-centered counselors argue that their methods are neutral, but their methods are likely to influence clients to make self-serving choices. Client-centered lawyers *lead* clients to focus on their own interests, rather than the interests of others. They impose a framework of client selfishness. Client-centered lawyers are likely to produce self-centered clients.

In some situations, it may be that the client-centered model's focus on client empowerment is justified. Generally, poor people need empowerment. Poor clients tend to defer to lawyers, and their lawyers may be tempted to tell clients what to do. Lawyers for poor people may need the client-centered model's focus on client autonomy. In those cases in which the lawyer represents a poor client against a rich opponent, there is probably little need for the poor client to worry about the interests of the rich opponent—the rich opponent likely will have plenty of lawyers to look out for his interests. But when a lawyer represents the wealthy client against the (often unrepresented) poor party, the lawyer's exclusive focus on client autonomy is likely to result in injustice. If clients with great power (those who produce dangerous products, have many employees, or have a great impact on the environment) make decisions based solely on "consequences to the client," they (and their lawyers) can cause great harm.

C. A Collaborative Model

Whereas the authoritarian models provide too small a role for clients, the client-centered approach provides too small a role for lawyers. An alternative to the authoritarian and client-centered models is a collaborative decision-making model, in which lawyer and client together address and resolve issues

wrong." The lawyer might try and persuade the client to change his mind. *See* BASTRESS & HARBAUGH, *supra* note 17, at 334-35; *see also* BINDER ET AL., *supra* note 18, at 282-84. However, there are likely to be problems with attempting to engage in moral discourse at this stage. Shaffer and Cochran state:

First, client-centered counselors' moral discourse comes into play only when the lawyer feels that the client wants to do something that is "morally wrong." Morality (in and out of the law office) is not generally a matter of choosing whether to do something that is "morally wrong"; more often it is a choice between something that is better and something that is worse. It may not be often that the client will make a choice that the lawyer feels is "morally wrong," but clients constantly are faced with issues that have moral implications. We feel that those moral implications should be considered during the decision-making process.

SHAFFER & COCHRAN, *supra* note 1, at 23-24 (footnote omitted).

Second, the method of moral discourse suggested by the client-centered counselors is likely to be ineffective. After lawyers encourage the client to see things solely from the client's perspective and the client makes a decision, it will be difficult for lawyers to shift gears and reverse the direction of the counseling. *See* SHAFFER & COCHRAN, *supra* note 1, at 24.

that arise in the representation.¹¹² A collaborative model of lawyering is emerging from several sources.

Douglas Rosenthal not only exposed the authoritarian nature of many lawyers, but he also suggested the outlines of a collaborative model of lawyer/client relations. He called for lawyers and clients to engage in "mutual participation in a cooperative relationship in which the cooperating parties have relatively equal status, are equally dependent, and are engaged in activity that will be in some ways satisfying to both [parties]."¹¹³ A collaborative model would seek to draw on the strengths of both lawyer and client.

Thomas Shaffer and others have used the friendship analogy to illustrate how a lawyer might raise and discuss issues with a client.¹¹⁴ Anthony Kronman explains how the sympathy and detachment that a friend (or a lawyer) brings to a relationship can help someone make a wise decision:

Friends take each other's interests seriously and wish to see them advanced; it is part of the meaning of friendship that they do. It does not follow, however, that friends always accept uncritically each other's accounts of their own needs. Indeed, friends often exercise a large degree of independent judgment in assessing each other's interests, and the feeling that one sometimes has an obligation to do so is also an important part of what the relation of friendship means. What makes such independence possible is the ability of friends to exercise greater detachment when reflecting on each other's needs than they are often able to achieve when reflecting on their own. A

112. For a more comprehensive development of a collaborative decision-making model, see ROBERT F. COCHRAN, JR., ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO LEGAL INTERVIEWING AND COUNSELING* (1999). James Moliterno and John Levy describe the collaborative model as follows:

The lawyer and client say, "Let's work together to reach the objective." They share responsibility for diagnosis, action and implementation. They divide responsibility along sensible lines accounting for the lawyer's training and experience and the client's concern about the representation matter.

JAMES E. MOLITERNO & JOHN M. LEVY, *ETHICS OF THE LAWYER'S WORK* 86 (1993).

113. ROSENTHAL, *supra* note 93, at 10.

114. See SHAFFER & COCHRAN, *supra* note 1, at 40-54; Thomas L. Shaffer, *A Lesson From Trollope for Counselors at Law*, 35 WASH. & LEE L. REV. 727, 733-35 (1978); see also Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439, 455-59 (1990). In an earlier incarnation of his views of lawyer/client relationships, Simon called on lawyers and clients to act as partners, assuming mutual responsibility for the resolution of moral issues in the relationship. See William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 131-33.

Charles Fried uses the friendship analogy for a very different purpose, suggesting that just as friends prefer friends to other people, lawyers should prefer clients to other people. See Fried, *supra* note 64, 1071-75.

friend's independence can be of immense value, and is frequently the reason why one friend turns to another for advice. Friends of course expect sympathy from each other: it is the expectation of sympathy that distinguishes a friend from a stranger. But they also want detachment, and those who lack either quality are likely to be poor friends.¹¹⁵

The friendship analogy is especially helpful in illustrating how a lawyer and client might address moral issues under a collaborative model. Whereas Simon suggests that lawyers should unilaterally seek the justice that they find in legal values, under a collaborative model the lawyer would raise and discuss such issues with a client in the manner that friends raise and discuss such issues, neither ignoring such matters nor imposing her views on the client. Unlike Simon's lawyer, who looks to "legal values" for justice, the collaborative lawyer and client would seek to resolve issues based on the client's moral values. Justice would be a subject of lawyer/client discourse. Even though it would be the client who ultimately makes the decisions in the relationship, the lawyer as friend and counselor may have a substantial impact on those decisions.

In the law office, justice is generally a matter of (1) considering the interests of other people, and (2) treating those people fairly. The lawyer can suggest both of these factors as part of the decision making process. One of the stages of decision making in the law office is considering the likely consequences of alternate courses of action. As noted previously, the client-centered counselors suggest that the lawyer and client consider only "consequences to the client." But the lawyer and client should consider the consequences to other people as well. The lawyer and client should consider all of the consequences that might arise from various alternatives. As a part of the decision making process, the lawyer can easily ask the client to help identify the consequences to other people of the alternatives.

A second place at which the lawyer and client might consider the interests of other people is the final point of decision making. The focus of discussion should be on how the client's ethics address the questions that they confront. A lawyer can raise this by merely asking a client what would be fair.¹¹⁶ Like Simon's model, collaborative decision making would be contextual. The client and lawyer would resolve issues in the way that seems fair in light of all of the facts and circumstances.

There is, of course, the danger that either the lawyer or client will dominate the other, that the relationship will not be one of mutuality. With many clients, the lawyer is in the dominant position. The lawyer has the knowledge of the law and the trappings of power. She has the secretaries and the certificates and sits

115. See KRONMAN, *supra* note 1, at 131-32.

116. For a more fully developed discussion of how the lawyer/client conversation might be structured, see SHAFFER & COCHRAN, *supra* note 1, 94-134.

behind the big desk in the elevated chair. Unsophisticated clients may want the lawyer to control the action. But in another world of lawyering, the client is likely to be in the position of power. The lawyer may be little more than an employee of the corporate client. If the lawyer is in-house counsel she will be an employee of the corporate client. The CEO is likely to sit behind the bigger desk, in the more elevated chair. In both of these settings, the lawyer will have to work to attain any level of equality with the client. The lawyer may need to empower the weak client and assert herself with the strong client.

There are several things that a lawyer can do to move toward equality with the client. For example, the lawyer can see that the names by which she and the client refer to one another convey equality. If the powerless client calls the lawyer by a formal name ("Ms. Jones"), the lawyer can refer to the client by a formal name ("Mr. Smith"). If the powerful client calls the lawyer by her first name ("Lisa"), the lawyer can refer to the client by his first name ("Ed").

At many points in conversations with clients, the lawyer has an opportunity to either empower the client or to assert power over the client. In my view, the role of the lawyer should vary, depending on the client and the circumstances.¹¹⁷ At one end of the spectrum, a lawyer representing a poor, unsophisticated client should generally engage in little or no persuasion. She might ask questions in a nondirective manner: "Would anyone else be affected if you chose this option?" and "What do you think would be fair?" With this client, the lawyer should be much like the client-centered lawyer; her primary concern should generally be empowering the client.

At the other end of the spectrum, a lawyer who learns that a corporate executive approved the sale of defective kidney dialysis machines¹¹⁸ should be quite directive, using methods that border on those of an authoritarian lawyer: emotionally raising the interests of others ("Think what you might do to these patients!"), making moral judgments ("You did a terrible thing!"), and directing the client ("You have got to stop those sales!"). Under these circumstances, the lawyer's primary concern should be influencing the client.

Of course, there are various levels of persuasion that the lawyer could use between these two extremes. There are two factors that should influence the level of intensity with which the lawyer engages the clients: the balance of power between the lawyer and client and the danger that the actions being considered pose to other people. When the determinants of power are primarily on the lawyer's side, the lawyer should hesitate to exercise power over the client. When the determinants are equal or primarily on the side of the client, the lawyer is unlikely to overcome the client and can feel freer to express opinions about the

117. For additional discussion of the ways, and circumstances under which, a lawyer might vary the intensity of moral discourse, see Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons From Dostoyevsky*, 35 HOUS. L. REV. 327, 327-97 (1998).

118. See *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 105 (Ill. 1991).

decisions that must be made. The lawyer's natural instincts are likely to be in the opposite direction. The powerful lawyer (with weak clients) is likely to feel comfortable asserting power; the weak lawyer (with powerful clients) is likely to be hesitant to raise moral concerns and may fail to give the independent advice that the client needs. If the lawyer is to involve the client in moral discourse and not dominate the client, she may need to act against her instincts. The powerful lawyer may need to work to respect the dignity of the weak client; the weak lawyer may need courage to confront the powerful client. The second factor is the danger to other people. When the client is considering engaging in clear injustice, the lawyer should attempt to persuade the client to act justly.

There is, of course, the danger that the client will not want to take seriously the interests of other people; he may want a hired gun or a godfather lawyer. If the values of the lawyer and client are too different, it may be that there is no potential for collaborative action. If the client wants the lawyer to take actions that the lawyer believes are wrong, I believe that the lawyer should withdraw. In cases in which serious injury is threatened to another person, as in the kidney dialysis case, I believe that the lawyer should threaten to disclose the danger, and if necessary, unilaterally disclose it.¹¹⁹ In the vast majority of cases, however, I believe that the lawyer and client are likely to agree on a fair resolution of the issues that they confront.

IV. CONCLUSION

William H. Simon is right about many things. Many lawyers have lost their most important purpose, the pursuit of justice. Lawyers should seek justice in light of all of the circumstances of each case. They cannot put on blinders and assume that aggressive advocacy will yield justice. My argument is that lawyers should involve clients in the pursuit of justice.

My concern is broader than the law office setting. We need as a culture to begin to engage in moral discourse. Discussions about justice need to take place in a wide range of contexts—in coffee shops, over neighborhood fences, and at corporate board meetings. They also need to take place in law office encounters between lawyers and clients. Simon's proposal that lawyers control decisions in the law office based on "legal values" would inhibit and muddle that discourse.

119. The legal profession's confidentiality rule provides no exception in such circumstances. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1999). However, I believe, as does Simon, that the lawyer should disclose confidential information in order to protect someone from death or serious injury. See SIMON, *supra* note 5, at 164. Even Monroe Freedman, one of the strongest proponents of the Dominant View believes that disclosure would be justified. See FREEDMAN, *supra* note 63, at 65.